STATE OF MICHIGAN

COURT OF APPEALS

JULIE RHOADES, Personal Representative of the ESTATE OF CHRISTOPHER JAY SMITH, III, Deceased,

Plaintiff-Appellant,

v

FRUITLAND TOWNSHIP,

Defendant-Appellee.

UNPUBLISHED
January 15, 2004

No. 241951
Muskegon Circuit Court
LC No. 01-040734-CK

Before: Markey, P.J., and Murphy and Talbot, JJ.

PER CURIAM.

Plaintiff appeals by right from the trial court order that granted summary disposition to defendant pursuant to MCR 2.116(C)(8). After the drowning death of Christopher Jay Smith, III in White Lake Channel plaintiff filed a breach of contract claim against defendant under a third-party beneficiary theory alleging that defendant breached its contract with the United States Army Detroit District Corps of Engineers ("the Corps) that required defendant to inspect life ring buoys on a daily basis and to install replacements to ensure that the buoys were available to the public at all times. The trial court ruled that plaintiff was not a third-party beneficiary as defined in MCL 600.1405, the third-party beneficiary statute. Because our Supreme Court in *Koenig v South Haven*, 460 Mich 667; 597 NW2d 99 (1999) held that a contract's general reference to "the public" is insufficient to confer third-party beneficiary status on a member of the public, we affirm.

We review de novo a grant or denial of summary disposition based upon a failure to state a claim. *Beaty v Hertzberg & Golden, PC*, 456 Mich 247, 253; 571 NW2d 716 (1997); *Trost v Buckstop Lure Co*, 249 Mich App 580, 583; 644 NW2d 54 (2002). A motion under MCR 2.116(C)(8) tests the legal sufficiency of a claim by the pleadings alone. *Beaudrie v Henderson*, 465 Mich 124, 129; 631 NW2d 308 (2001). All factual allegations in support of the claim are accepted as true, as well as any reasonable inferences or conclusions which can be drawn from the facts, and construed in the light most favorable to the nonmoving party. *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999). The motion should be granted only when the claim is so clearly unenforceable as a matter of law that no factual development could possibly justify a right of recovery. *Id.*

MCL 600.1405, the statute that governs the rights of third party beneficiaries in contracts, provides, in relevant part, as follows:

> Any person for whose benefit a promise is made by way of contract, as hereinafter defined, has the same right to enforce said promise that he would have had if the said promise had been made **directly** to him as the promisee.
>
> (1) A promise shall be construed to have been made for the benefit of a person whenever the promisor of said promise has undertaken to give or to do or refrain from doing something directly to or for said person.
>
> * * *
>
> (2)(b) If such person is not in being or ascertainable at the time the promise becomes legally binding on the promisor then his rights shall become vested the moment he comes into being or becomes ascertainable if the promise has not been discharged by agreement between the promisor and the promisee in the meantime. [Emphasis added.]

In *Koenig, supra*, a breach of contract case that involved a Memorandum of Understanding (MOU) between the Corps and a municipality, our Supreme Court pointed out that under MCL 600.1405 a person is only a third-party beneficiary of a contract when "the promisor undertakes an obligation 'directly' to or for the person." *Id.* at 677. It explained that although a third-party beneficiary may be a class of people provided that the class is "sufficiently described or designated," it emphasized that the class must be sufficiently described and that "the class must be something less than the entire universe, e.g., 'the public.'" *Id.* at 680. Our Supreme Court further explained that "an objective standard is to be used to determine from the contract itself whether the promisor undertook 'to give or to do or to refrain from doing something *directly* to or for' the putative third-party beneficiary." *Id*., internal citations omitted.

Koenig resolves the issue in this appeal. Under the MOU at issue here, defendant's responsibilities include the duties to daily inspect the buoys "to ensure that they are present and in good condition," and "to install replacements as necessary to ensure that ring buoys are available to the public at all times." As in *Koenig*, the MOU here references only "the public" and does not provide a sufficiently specific class designation.

Although plaintiff both at the summary disposition phase and again on appeal describes the class of third-party beneficiaries as those members of the public who are in need of life rings because they are in distress in the water, that specific designation does not appear in the MOU, its addendum, or the lease. It is a classification plaintiff devised, not one the contracting parties devised. Because the MOU and its addendum do not reveal any specific class designation and only reference "the public" generally, this Court is constrained by our Supreme Court's reasoning in *Koenig* that a reference to the public generally is insufficient to confer third party beneficiary status. *Koenig, supra* at 680.

Because the contract at issue did not confer third-party beneficiary status on plaintiff, plaintiff cannot allege a breach of contract claim under a third-party beneficiary theory. For this

reason, we conclude that the trial court properly granted defendant summary disposition pursuant to MCR 2.116(C)(8).

We affirm.

/s/ Jane E. Markey
/s/ William B. Murphy
/s/ Michael J. Talbot